

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

INVISTA S.à r.l. and INVISTA)	
(Canada) Company,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 07-119 (GMS)
)	
FIBER RESOURCES INTERNATIONAL,)	
INC.,)	
)	
Defendant.)	

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER VENUE

Plaintiffs INVISTA S.à r.l. and INVISTA (Canada) Company (collectively "INVISTA" or "Plaintiffs") hereby submit this opposition to Defendant Fiber Resources International, Inc.'s ("FRI" or "Defendant") Motion to Transfer Venue. With its Motion, FRI seeks to transfer this action to the Northern District of Georgia despite expressly agreeing in writing to Delaware as the appropriate venue for any dispute between the parties. Indeed, FRI regularly and systematically transacted business with a Delaware corporation (DuPont) as part of the contractual relationship at issue. FRI cannot now claim that it has not transacted business in Delaware and therefore should not be subject to jurisdiction there. Undoubtedly then, FRI's Motion is offered simply as another delay tactic, designed to prevent INVISTA from expeditiously addressing its claims in the forum agreed to by the parties.

FACTUAL BACKGROUND

INVISTA, and its affiliate companies, is one of the world's largest providers of integrated fibers and polymers. Complaint (D.I. 1), ¶ 9. Amongst its other businesses, INVISTA sells waste fiber to customers for use in various products and for various applications, including

FRI. *Id.* Beginning at least as early as 2001, INVISTA (through its predecessor-in-interest DuPont)¹ began selling waste fiber to FRI through a series of individual purchase agreements. *Id.*

To initiate a purchase, FRI would contact INVISTA to inquire how much of a particular waste fiber was available for sale from INVISTA at any given time. *Id.*, ¶ 10. INVISTA would respond to FRI with the amount of the desired waste fiber that was available. *Id.* FRI would thereafter submit Purchase Orders to INVISTA identifying the type and volume of particular waste fiber it desired to purchase. *Id.* In response to FRI's Purchase Orders, INVISTA would, at times, issue Order Acknowledgements to FRI specifying the fiber type, quantity, sales price, and shipping information for the particular order. *Id.*, ¶ 11. The Order Acknowledgements also contained INVISTA's standard terms and conditions ("Terms and Conditions") that governed INVISTA's proposed sale of waste fiber to FRI. *Id.*; Complaint Exh. A. Upon shipment of waste fiber to FRI, INVISTA would issue an Invoice to FRI for the amount due from FRI for that shipment. *Id.*, ¶ 12. The Invoices also contained the same Terms and Conditions that governed INVISTA's sale of waste fiber to FRI. *Id.*; Complaint Exh. C.

Relevant to FRI's Motion, the Terms and Conditions contained explicit forum selection clauses specifying the Delaware as the applicable forum for any dispute relating to INVISTA's sale of fiber to FRI. Specifically, those Terms and Conditions provided as follows:

20. GOVERNING LAW/VENUE FOR DISPUTES. The validity, performance, construction, and effect and all matters arising out of or relating to the Agreement shall be interpreted in accordance with the Laws of the State of New York, without regard to its conflicts of law rules. . . . Any action or proceeding between Buyer and INVISTA relating to the Agreement shall be commenced and maintained exclusively in the state or federal courts in

¹ DuPont Textiles, Inc., owned by E.I. DuPont de Nemours, was renamed INVISTA, Inc. in 2003. Thereafter, INVISTA, Inc. was purchased by Koch Industries, Inc. in 2004 and renamed INVISTA S.à r.l.

Wilmington, Delaware, and Buyer submits itself unconditionally and irrevocably to the personal jurisdiction of such courts.

See Terms and Conditions, ¶ 20, Complaint Exhs. A and C. FRI never objected to the Terms and Conditions proposed by INVISTA.

Up until 2006, FRI had paid INVISTA for the fiber it purchased. From April through June 2006, FRI purchased waste fiber in the amount of \$589,471.26 from INVISTA in a series of transactions. Complaint, ¶ 13. FRI accepted the waste fiber shipped by INVISTA in connection with each purchase transaction, and thereafter failed to pay INVISTA for the waste fiber that it shipped to FRI from April through June 2006. *Id.*, ¶¶ 14-15.

INVISTA filed this action on February 26, 2007 to recover the amount due on its unpaid invoices. In response, FRI admitted that it purchased waste fiber in the amount of \$589,471.26 from INVISTA and failed to pay for that fiber. Answer (D.I. 14), ¶¶ 13-15. However, to excuse its failure to pay INVISTA, FRI also claimed that INVISTA breached the terms of an oral agreement whereby INVISTA would only sell waste fiber to be used for a certain application (as an additive to concrete mixes) to FRI. *Id.*, ¶¶ 24-25. According to FRI's principal, Art Hamilton, this so-called "hand shake" agreement had no specific terms (duration, price, quantity, or termination provision), only that INVISTA would not sell waste fiber for concrete applications to anyone other than FRI. *See* Depo. of J. Hamilton, 71:19-72:19, 73:22-74:9, 83:16-85:22 (excerpts attached hereto as Exh. A). INVISTA denied that it entered into such an agreement, and claimed that such an oral agreement was barred by the applicable Statute of Frauds. Reply to Counterclaim, D.I. 6, pp. 1, 3.

ARGUMENT

FRI claims that it does not transact business in Delaware, and that it never agreed to litigate in the District of Delaware. As such, this case should be transferred to the forum of its choice, the Northern District of Georgia. In reality, FRI has routinely transacted business in Delaware, and its so-called “oral exclusive dealings agreement,” which is the subject of its counterclaim, was allegedly entered into with a Delaware corporation. Moreover, the contracts which form the basis for this dispute all contained forum selection clauses establishing Delaware as the applicable forum for any disputes. While FRI may dispute that it ever read those documents, or agreed to be bound to the Terms and Conditions made part of them, it cannot dispute that it received the agreements, accepted INVISTA’s shipments, and, until April 2006, paid INVISTA the money it was owed.

I. INVISTA’s Choice of Forum – Delaware – Should Not be Disturbed.

FRI seeks to deprive INVISTA of its choice of forum, claiming that venue in Delaware is either improper, under 28 U.S.C. § 1406, or inconvenient, under 28 U.S.C. § 1404. However, it has not demonstrated the exceptional circumstances necessary to dispute INVISTA’s choice of Delaware for this dispute. First, the parties agreed in writing to Delaware as the forum for their dispute. Second, FRI has entered into contracts with Delaware corporations and has regularly transacted business in Delaware. As such, FRI cannot be heard to complain when it is required to litigate in Delaware.

A. Applicable Standards for FRI’s Transfer Request.

A transfer request pursuant to Section 1406 is appropriate when venue in the filed forum is improper. *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 878 (3d. Cir. 1995). However, venue

is proper in a district where the defendant transacts business and is otherwise subject to personal jurisdiction. *Id.* at 879 (citations omitted).

Under Section 1404, a moving party has the burden of establishing that a transfer would serve the convenience of the parties and witnesses and the interests of justice. *Id.* In ruling on such motions, courts consider a variety of private and public interest factors, including the plaintiff's choice of forum, the defendant's preference, the convenience of the parties and witnesses, the location of records, enforceability of a judgment, practical considerations of the court, the relative administrative difficulty in the two courts, the local interest, and the familiarity of the trial judge with the applicable law. *Id.* at 879-80 (citations omitted). "Within this framework, a forum selection clause is treated as a manifestation of the parties' preference as to a convenient forum." *Id.* at 880. Indeed, the parties' agreement as to the most proper forum is entitled to substantial consideration, although it should not receive dispositive weight. *Id.* (citations omitted). Where the forum selection clause is valid, which requires that there have been no "fraud, influence, or overweening bargaining power," the moving party bears the burden of demonstrating why it should not be bound by the contractual choice of forum. *Id.* (citation omitted). Indeed, "it is incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Bbdova, LLC v. Automotive Tech., Inc.*, 358 F. Supp. 2d 387, 390 (D.Del. 2005) (citations omitted).

B. The Parties Agreed to Litigate Their Claims in Delaware.

As noted above, the governing contracts entered into by the parties unequivocally provide

for Delaware as the forum for any disputes.² INVISTA, as the master of its offer, has wide latitude over the terms of its offer, and may impose any terms or conditions of its choosing. *See* Restatement (2d) of Contracts, § 60; *Brill v. Burlington Northern, Inc.*, 590 F. Supp. 893, 898 (D.Del. 1984). Furthermore, this Court has clearly stated that:

a forum selection clause is *presumptively valid* and will be enforced by the forum unless the party objecting to its enforcement establishes (1) that it is the result of fraud or over-reaching, (2) that enforcement would violate a strong public policy of the forum, or (3) that enforcement would in particular circumstances of the case result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable.

McGurk v. Swisher Hygiene Franchise Corp., 2003 WL 252124, at *1 (citations omitted) (emphasis added). In its Motion and the accompanying Affidavit of Jack Arthur Hamilton, FRI does nothing to overcome the presumption that the forum selection clause is valid and presents no evidence that enforcement of the parties' forum selection clause would result in fraud or overreaching, or that enforcement would violate some public policy or result in unreasonable inconvenience. Instead, FRI conveniently claims that it did not regularly receive those Terms and Conditions as part of any documentation received from INVISTA, and that it did not agree to be bound by those terms. FRI Brief (D.I. 29), p. 3. In reality, while FRI may not have read the documents, it routinely received those Terms and Conditions from INVISTA, and never objected to them. Indeed, FRI admits that it received at least 3 invoices with the Terms and Conditions included by no later than May 2006. Affidavit of Jack Arthur Hamilton, D.I. 29, Ex. A at ¶ 10.

² INVISTA revised the Terms and Conditions contained in its invoices during the course of the parties' relationship. At all times, however, first DuPont's and then INVISTA's Terms and Conditions specifically required Delaware as the forum for any disputes. Moreover, the last revision was made prior to 2006, so that all of the Order Acknowledgements and Invoices issues to FRI during 2006 (attached as Exhibits A and C to INVISTA's Complaint) contained the forum selection clause detailed above.

Specifically, FRI would receive from INVISTA invoices detailing the volume and price of product purchased with a particular order. Those invoices included INVISTA's standard Terms and Conditions, and specifically stated on their face that those Terms and Conditions were part of the sale. *See* Complaint Exhs. A and C. As part of its documentation process for its purchases from INVISTA, FRI would compile all of the documentation related to a particular purchase into a single file. *See* Depo. of L. Norris, 40:5-16, 42:16-44:6 (excerpts attached hereto as Exh. B). Literally dozens of copies of INVISTA's Terms and Conditions were contained in FRI's files produced as part of this litigation. Indeed, Art Hamilton, one of FRI's owners, and Laurie Norris, a FRI employee, both confirmed that FRI regularly received INVISTA invoices containing the Terms and Conditions during the course of FRI's business. Hamilton Depo. (Exh. A), 150:17-151:2, 208:10-209:9, Norris Depo. (Exh. B), 44:3-6, 56:11-58:21. Further, even though FRI claims that it never "agreed" to be bound by those terms, its conduct demonstrates otherwise. By accepting INVISTA's goods, without objection or complaint to the governing terms of sale, FRI is now bound by those terms, including the forum selection clause.

C. FRI Transacts Business in Delaware.

FRI also argues that Delaware has not valid connection to this dispute, and that it does not transact business in Delaware. FRI Brief, p. 2. Again, FRI misstates the facts. Not only did FRI agree to litigate in Delaware, it routinely transacted business in Delaware.

Specifically, beginning in 2001, FRI contracted with, and purchased concrete fiber, from DuPont Textiles, prior to the formation of INVISTA and its acquisition by Koch Industries. Hamilton Depo. (Exh. A), 42:10-13. FRI knew that DuPont Textiles was headquartered in Wilmington, Delaware, and even received invoices from DuPont identifying its Delaware office location. Following INVISTA's formation, FRI continued to receive invoices identifying

INVISTA as a company headquartered in Delaware. *Id.*, 205:13-25. It was only after Koch Industries purchased INVISTA in 2004 that the governing invoices identified a different address. *Id.*, 208:16-209:9.

As part of its business dealings with DuPont, Mr. Hamilton even traveled to Wilmington to meet with a DuPont employee. *Id.*, 145:10-146:6. Thereafter, even though INVISTA moved its headquarters to Kansas (following the acquisition), FRI continued to do business in Delaware. As late as 2006, FRI was doing business with Kenco, Inc., a company located in Seaford, Delaware. Norris Depo. (Exh. B), 34:25-37:2. Specifically, certain shipments of INVISTA fiber were made available to FRI at a Kenco facility in Seaford, and FRI would have to communicate with Kenco in order to arrange for the shipments to be picked up. *Id.* When FRI transacts business in Delaware, and even sends an employee there as part of that relationship, it is “axiomatic” that FRI “purposefully availed itself of the privilege of conducting activities in the state, . . . and thus “could reasonably anticipate being haled into Court in Delaware.” *Speakman Co. v. Harper Buffing Machine Co., Inc.*, 583 F. Supp. 283, 275 (D.Del. 1984) (citations omitted).

Finally, as part of its counterclaims in this case, FRI seeks to enforce an alleged oral agreement entered in 2001 between Mr. Hamilton and Andy Howell, an INVISTA employee. At the time the alleged agreement was reached, Mr. Howell as employed by DuPont Textiles, a Delaware corporation. As such, FRI is seeking to enforce an alleged contract entered into with a Delaware company, and should not surprised when it must do so in Delaware.

II. FRI’s Motion to Transfer is Merely Offered as a Delay Tactic to Impede INVISTA’s Ability to Pursue its Claims.

INVISTA also submits that FRI’s Motion is simply another example of FRI’s delay tactics in this case. At every turn, FRI has failed to timely meet its obligations. FRI failed to

timely serve its Rule 26 Initial Disclosures, due on October 19, 2007, and only did so on November 29, 2007 after receiving a demand from INVISTA. *See* Letter from Robert L. Lee (Attached as Exh. C). FRI changed counsel in December 2007, necessitating a postponement of the then scheduled mediation. It failed to timely respond to INVISTA's interrogatory and document requests, served on December 4, 2007, and again only did so on January 21, 2008 after receiving a demand from INVISTA. *See* Letter from Kelly E. Farnan (Attached as Exh. D). Thereafter, FRI claimed that it could not be available for depositions prior to the scheduled close of discovery on January 18, 2008, forcing INVISTA into agreeing to a stipulated two week extension to complete its timely noticed depositions.

Pursuant to the stipulated extension, fact discovery is set to close today and case dispositive motions are due to be filed on February 15, 2008. D.I. 31. Accordingly, the only events left in this case are case dispositive motions and trial. FRI's Motion is a clear attempt to delay entry of a judgment in this Court against it and INVISTA would be unduly prejudiced if the case were transferred at this stage.

Finally, with regard to the instant motion, counsel for FRI first mentioned the possibility of seeking an alternate venue for this case during the Court's Scheduling Conference held on September 28, 2007. During the conference, counsel for FRI was instructed to confer with counsel for INVISTA to exchange positions to determine whether a motion challenging jurisdiction and venue was appropriate. *See* Trans. From September 28, 2007 Conference (Attached as Exh. E) at p. 5.³ Not only did FRI not timely file the instant motion following the

³ Indeed, FRI's Motion did not contain the certificate contemplated by Local Rule 7.1.1 and should be denied on that basis alone.


Court's conference, but FRI also failed to even address the issue with counsel for INVISTA prior to filing the instant motion.⁴

CONCLUSION

For the reasons set forth above, INVISTA respectfully requests that FRI's Motion to Transfer Venue be denied.

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Dated: February 1, 2008

⁴ Of note, while FRI claims it has not transacted business in Delaware, and Delaware has not connection to this dispute, FRI has not moved to dismiss INVISTA's claims for lack of personal jurisdiction pursuant to F.R.C.P. 12(b)(2).

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 1, 2008, I electronically filed the foregoing with the Clerk of Court using CM/ECF and caused the same to be served on the defendant at the address and in the manner indicated below:


BY HAND DELIVERY

David L. Finger
Finger & Slanina, LLC
One Commerce Center
1201 Orange Street, Suite 725
Wilmington, DE 19801-1155

I hereby certify that on February 1, 2008, the foregoing document was sent to the following non-registered participants in the manner indicated:

BY FIRST-CLASS U.S. MAIL

W. Winston Briggs
Decker, Hallman, Barber & Briggs
17th Floor
260 Peachtree Street
Atlanta, GA 30303



Kelly E. Farnan (#4395)

EXHIBIT A

Invista, et al. v. Fiber Resources International, Inc. 07-119 (GMS)
Jack A. Hamilton, Jr. January 28, 2008

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

INVISTA S.à r.l. and INVISTA)	
(Canada) Company,)	
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vs.)	CIVIL ACTION
)	FILE NO.:
)	07-119 (GMS)
FIBER RESOURCES INTERNATIONAL,)	
INC.,)	
)	
Defendant.)	

- - -

Deposition of JACK A. HAMILTON, JR.,
taken on behalf of the Plaintiffs, pursuant to
the stipulations agreed to herein, before
Steve S. Huseby, Registered Professional
Reporter and Notary Public, at Decker,
Hallman, Barber & Briggs, 17th Floor, 260
Peachtree Street, Atlanta, Georgia, on the
28th day of January, 2008, commencing at the
hour of 9:12 a.m.

1 concrete fiber or was it fiber for some other
2 application?

3 A. Fiber for another application.

4 Q. What kind of fiber was that?

5 A. I think it was gang wound yarn.

6 Q. What is gang wound yarn used for?

7 A. Mainly chopping, cutting short.

8 Q. What does it go into?

9 A. Wet laid nonwovens.

10 Q. Do you recall about what year FRI
11 began purchasing concrete fiber for and from
12 DuPont?

13 A. It was late 2001, early 2002.

14 Q. Prior to that time, in the beginning,
15 I guess in the 1996, 1997 timeframe, did FRI
16 purchase other types of fiber from DuPont
17 other than this gang wound yarn?

18 A. We might have purchased some, you
19 know, high tenacity yarn, but I don't remember
20 the time -- the timeframe.

21 Q. Beginning in I guess late 2001 when
22 FRI first purchased concrete fiber from DuPont
23 through the time period of I guess May of 2006
24 when FRI stopped buying concrete fiber from
25 Invista could you estimate the percentage of

1 never really changed for the end product.

2 Q. Okay. So the raw material itself
3 would come in, in effect, different shapes and
4 sizes?

5 A. That -- I guess. Yeah, I guess that's
6 a good way to term it. I don't --

7 Q. But it would still be processed down
8 in general to the same finished product?

9 A. Yes.

10 Q. Did the size of the finished product
11 ever change? I think we talked about a range
12 of 6 to 38.

13 A. I mean, yes, it would change, I mean,
14 you know, occasionally.

15 Q. Did some customers prefer different
16 sizes?

17 A. Yeah; I mean, they ordered different
18 sizes.

19 Q. Did you ever have discussions with Mr.
20 Howell about exclusivity?

21 A. Absolutely.

22 Q. On how many occasions did you have
23 those discussions with Mr. Howell?

24 A. I don't know how many, but several.

25 Q. Were they over any particular

1 timeframe for those conversations?

2 A. When he initially approached me about
3 the market, I said, if I go out and develop
4 this, I want to be protected in that market.

5 Q. What did he -- how did he respond?

6 A. He told me he would protect me in that
7 market.

8 Q. What did you have an understanding
9 that that meant from him?

10 A. That he would not sell to anybody else
11 or compete with me in any way in that market.

12 Q. How many times did you have that
13 conversation with Mr. Howell?

14 A. I don't know. I mean --

15 Q. Did you ever ask Mr. Howell to put
16 that in writing?

17 A. I did.

18 Q. Did he?

19 A. He wouldn't.

20 Q. Why not?

21 A. He said that dealing with these large
22 companies like Invista and DuPont, it would
23 take a year to get it done due to the lawyers
24 and the legalities and that I had his word
25 that he would protect me.

1 Q. Did he tell you that he could not put
2 it in writing?

3 A. No.

4 Q. Did he tell you that Invista or DuPont
5 would not approve of such a relationship?

6 A. No.

7 Q. I think you testified earlier in
8 effect that FRI bought all the concrete fiber
9 that Invista could supply.

10 A. Yes.

11 Q. In effect, your demand from your
12 customers exceeded the supply you could have,
13 is that a fair characterization?

14 A. That's a fair characterization.

15 Q. How did you explain to your customers
16 whose orders you couldn't fulfill or whose
17 demands you could not meet?

18 A. I mean, I tried to keep a safety stock
19 of inventory. I mean, we basically had a
20 truck waiting every time they had a truckload
21 ready.

22 Q. Now, when you and Mr. Howell came to
23 this understanding on exclusivity, were there
24 any other terms or conditions of the
25 arrangement other than the fact I think in

1 your words that you would be protected in the
2 market?

3 A. Basically, I would be protected in the
4 market if I went out and developed it, and if
5 it ever changed, he would sit down and we
6 would discuss it.

7 Q. How long was this exclusive
8 relationship supposed to last?

9 A. We did not put a time limit on it.

10 Q. And I understand we talked earlier the
11 price varied over time. Do you recall ever an
12 instance where Invista had a supply of
13 concrete fiber that Fiber Resources did not
14 purchase or an offer was made that Fiber
15 Resources did not take?

16 A. On concrete fiber?

17 Q. Yes, sir.

18 A. Not to my knowledge.

19 Q. Was there a price point at which Fiber
20 Resources would not have taken a shipment from
21 Invista?

22 A. I mean, you have to be market
23 competitive. I mean, that's an understanding
24 of any business.

25 Q. Did Andy Howell ever tell you that he

1 recall.

2 Q. Okay. Do you have any idea what that
3 final price was per pound?

4 A. I mean, it was probably somewhere
5 between a dollar and a dollar ten.

6 Q. Did you have any understanding why the
7 price went up, more than doubled in the span
8 of five or so years?

9 A. The whole nylon -- all petrol chemical
10 based polymers and products have gone up
11 substantially. Look at your gas pump.

12 Can I make a quick bathroom run?

13 Q. Yes.

14 (Brief recess).

15 BY MR. LEE:

16 Q. When you were talking to Mr. Howell
17 about the terms and conditions under which
18 Invista would supply and FRI would purchase
19 concrete fiber, including some of these
20 conversations about exclusivity, did you all
21 talk about any sort of price caps or
22 guaranteed profit margin for FRI on the
23 product?

24 A. No.

25 Q. Did you talk about any sort of

1 limitations on the types of customers that FRI
2 could sell the product to?

3 A. I mean, what do you mean by -- I
4 mean --

5 Q. Well, I guess my point is this. I
6 understand you testified earlier this was off
7 grade or B grade product, and you mentioned a
8 concern that Invista may have had maybe with
9 some other application that they not
10 cannibalize their first run product.

11 A. Uh-huh.

12 Q. Were there any sort of discussions
13 like that with regard to concrete fiber?

14 A. No, no, no.

15 Q. Were there any limitations at all
16 placed by Andy on to whom or the conditions
17 under which FRI could sell this concrete
18 fiber?

19 A. No.

20 Q. You said that Andy promised that
21 Invista would not sell to anyone other than
22 FRI.

23 A. Yes.

24 Q. Did he make any other promises or
25 representations about the relationship or the

1 agreement?

2 A. No. I mean --

3 Q. What would have happened if Invista
4 was unable to make -- or unable to supply
5 concrete fiber at all?

6 A. I mean, you know, they would have quit
7 selling it to me.

8 Q. What would have happened if FRI
9 reached a position with its customers that it
10 could no longer -- that the supply that
11 Invista had available exceeded FRI's demand
12 for its product?

13 A. I mean, that never happened, but we
14 would have -- I mean, we would have worked
15 harder to develop more business, but it never
16 happened.

17 Q. Did you or Andy ever discuss the
18 circumstances under which FRI or Invista could
19 walk away from its relationship in concrete
20 fiber?

21 A. We just said if things changed, we
22 would sit down and discuss it.

23 Q. Was there the possibility that FRI
24 could find another supplier for nylon, raw
25 material for concrete fiber other than

1 where was he physically located?

2 A. I think he lived and worked out of his
3 house in the Charlotte, North Carolina area,
4 but I'm not 100 percent sure.

5 Q. At the time DuPont was headquartered
6 in Wilmington Delaware, is that correct, to
7 your knowledge?

8 A. To my knowledge, their parent company
9 was, yes.

10 Q. Did you ever go to Wilmington,
11 Delaware in connection with the DuPont
12 business?

13 A. I went at one point when I was
14 traveling through Philadelphia. I met with
15 the lady that was credit, but I think that was
16 when it was still DuPont.

17 Q. You said the lady that was credit.
18 Was there someone in the accounting department
19 or credit department?

20 A. Yes.

21 Q. And she was with DuPont in Wilmington?

22 A. Yes.

23 Q. Do you remember her name?

24 A. I think it was like Kathy Murdock
25 or -- the first name is Kathy.

1 Q. Is it Kathy McCormick?

2 A. McCormick, that's it.

3 Q. Do you recall about what timeframe
4 that was?

5 A. 2000, 2001, I'm guessing. I don't
6 really remember exactly.

7 Q. Now, there was a time period when FRI
8 would send its financials to Ms. McCormick at
9 DuPont or Invista, do you recall that?

10 A. I don't recall. I mean, I'm just
11 trying to sit here and think. I don't recall.

12 Q. I've got some documents I'll show you.
13 I'm just curious what the process was. But
14 I'll show you those later.

15 Now, after DuPont I guess became Invista
16 before it was sold to Koch Industries, did you
17 ever have occasion to visit its Wilmington
18 headquarters?

19 A. No.

20 Q. Mr. Short was in Charlotte. Andy
21 Howell is in Chattanooga, correct?

22 A. Correct.

23 Q. At some point, of course, Invista was
24 purchased by Koch Industries, correct?

25 A. Correct.

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1 through these documents and refresh your
2 memory or just take a look at them to get an
3 understanding of what is here.

4 A. Uh-huh. (Witness reviews document).

5 Q. What's your understanding as to what
6 Exhibit 6 is?

7 A. I mean, it looks like just shipping
8 records, you know, of an invoice with
9 attached -- it has a load list, which I'm
10 assuming is the way they did their bill of
11 lading, and then our load list that's in
12 detail, the first part, and a bill of lading.

13 Q. Now, the cover page has what's
14 referred to as a bill payment stub with a wire
15 transfer receipt.

16 A. Uh-huh.

17 Q. Is it your understanding or do you
18 know if it was FRI's regular business practice
19 to keep all of the documentation relating to a
20 specific order or a specific number of orders
21 all together by order number or by shipment
22 number?

23 A. I think we would keep all the
24 documents, you know, what we received, all
25 together and, you know, as we paid them we

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1 would staple either a check stub or a payment
2 stub.

3 Q. Okay. Looking at this first bill
4 payment stub, there appear to be four
5 different shipments or orders referenced, the
6 first dating February 23rd and the last dating
7 March 1st, 2006, with separate balance amounts
8 and payment amounts. Do you have an
9 understanding whether it would be FRI's
10 business practice then to keep all of the
11 records relating to those particular
12 referenced transactions together in one file?

13 A. Yeah, they should all be put together.

14 Q. So again, I would turn you to the
15 seventh page of the packet that is Exhibit 6.
16 It is another fax cover sheet dated February
17 27, 2006, from a Vanessa Sammons to Aimee at
18 Fiber Resources.

19 A. Uh-huh.

20 Q. Based upon either this fax cover sheet
21 or the other documents surrounding or
22 contained in Exhibit 6, do you have an
23 understanding from that who Kenco would be?

24 A. I mean, Kenco was probably a warehouse
25 that Invista used. Ask Invista, I'm sure they

1 marked for identification).

2 BY MR. LEE:

3 Q. I'm showing you what's been marked as
4 Plaintiff's Exhibit 24, a similar document
5 that we've been looking at. And, again, I'll
6 represent these documents came out of files
7 made available to us on Friday.

8 A. Uh-huh.

9 Q. Looking at the second page, again,
10 another invoice, it also shows the same merge
11 number, 89550.

12 A. Uh-huh.

13 Q. Does that lead you to believe that the
14 product being sold here is concrete fiber?

15 A. Yes.

16 Q. Looking at I guess the legend across
17 the top, Invista, Inc., with a Delaware
18 address, does this lead you to believe on this
19 date that this was after -- this date was
20 following the name change from DuPont to
21 Invista?

22 A. I don't know. They were -- they
23 worked as Invista for awhile before Koch
24 bought them, so you would know that date
25 better than me.

1 A. No.

2 (Plaintiff's Exhibit 26
3 marked for identification).

4 BY MR. LEE:

5 Q. Who is Nancy Jimenez?

6 A. I forgot about her. She was a lady
7 that was an accountant for us for a few months
8 I guess in '04. I had forgotten about her.
9 She was a great lady.

10 Q. I'm showing you what's marked
11 Plaintiff's Exhibit 26, which, again, I'll
12 represent are documents obtained from Fiber
13 Resources' files on Friday. It's a series of
14 invoice reference numbers from August of 2004.

15 A. Uh-huh.

16 Q. Looking to the first invoice, which I
17 guess is page 6, again, this product began as
18 merge number 89550 --

19 A. Which page?

20 Q. I'm sorry, it's page 6, which is the
21 first invoice. Given the merge number 89550,
22 would that lead you to believe this invoice
23 was for the sale of concrete fiber?

24 A. Yes.

25 Q. And I guess with the legend across the

1 top changing Invista's address from Delaware
2 to Wichita, that would be after the
3 acquisition by Koch Industries, to your
4 knowledge?

5 A. Yes, I would think so. Yes.

6 Q. Any reason to believe that FRI did not
7 receive these documents in its ordinary course
8 of business?

9 A. No.

10 (Plaintiff's Exhibits 27 and 28
11 marked for identification).

12 BY MR. LEE:

13 Q. Mr. Hamilton, I'm showing you what's
14 been marked as Plaintiff's Exhibit 27 first,
15 which is, again, a series of documents, and
16 it's got I guess the check stub number 13552
17 in the top right corner, again, in the same
18 document, okay. And I'll represent these were
19 obtained from Fiber Resources' files on
20 Friday.

21 Turning to the first page -- or the second
22 page of the document, the first invoice,
23 again, merge number 89550, does that lead you
24 to believe that at least for that invoice
25 these documents represent the sale of concrete

EXHIBIT B

Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

INVISTA S.à r.l. and INVISTA)	
(Canada) Company,)	
)	
Plaintiffs,)	
)	
vs.)	CIVIL ACTION
)	FILE NO.:
)	07-119 (GMS)
FIBER RESOURCES INTERNATIONAL,)	
INC.,)	
)	
Defendant.)	

- - -

Deposition of LAURIE A. NORRIS,
taken on behalf of the Plaintiffs, pursuant to
the stipulations agreed to herein, before
Steve S. Huseby, Registered Professional
Reporter and Notary Public, at Decker,
Hallman, Barber & Briggs, 17th Floor, 260
Peachtree Street, Atlanta, Georgia, on the
29th day of January, 2008, commencing at the
hour of 9:04 a.m.

1 A. I definitely worked with Missy McGee
2 and Betty Lloyd and someone named Frankie
3 Cheeks.

4 Q. What was your understanding of their
5 roles with Invista?

6 A. Betty and Frankie were in the
7 warehouse and Missy was in the credit
8 department.

9 Q. So you deal with Missy for finance
10 issues and the other two for shipping issues?

11 A. Right.

12 Q. Now, I understood that Fiber Resources
13 purchased other product from Invista other
14 than concrete fiber from time to time?

15 A. Right.

16 Q. Was the ordering system or invoicing
17 system for those types of purchases different
18 than those for concrete fiber?

19 A. No, it was pretty much the same.

20 Q. Do you recall having a similar
21 constant demand for other types of products at
22 FRI other than concrete fiber?

23 A. I know concrete was the main material
24 that we were in need of.

25 Q. Have you heard of a company called

1 Kenco, K E N C O, Group, Inc.?

2 A. Sure. It's a warehouse in Seaford,
3 Delaware.

4 Q. By that, you mean like a bonded
5 warehouse?

6 A. I believe so. It's just one where
7 they stored goods, or perhaps it was a plant
8 where they produced goods.

9 Q. Did you have dealings with Kenco?

10 A. Yes, just to pick up material when it
11 was available.

12 Q. Did Fiber Resources use Kenco to store
13 shipments or would that be a pickup point for
14 some shipments?

15 A. Pickup point.

16 Q. Do you recall a particular type of
17 product that was stored or came from Kenco?

18 A. Gosh, I don't remember.

19 Q. Do you know if it was used for
20 concrete fiber?

21 A. I really, going back on my memory, I
22 don't know specifics.

23 Q. I understand.

24 A. The main location we pick up from was
25 the South Boston, Virginia.

1 Q. And that was Clover Yarns?

2 A. There were two others in Lugoff, South
3 Carolina, and if material were available, we
4 would pick up from those points as well.

5 Q. And by pickup, you mean you would
6 arrange for a carrier or truck to in effect go
7 to the location and pick up material and
8 deliver it someplace for you?

9 A. Yes.

10 Q. Do you recall if Fiber Resources
11 selected Kenco as a warehouse slash shipper or
12 if it was simply notified by Invista that's
13 where the material would be?

14 A. It was just notified by Invista.

15 Q. Do you know how often FRI dealt with
16 Kenco or how often shipments were coming from
17 Kenco?

18 A. Gosh, not on the level of Clover
19 Yarns.

20 Q. Was it some sort of period, was it a
21 periodic basis, monthly, quarterly?

22 A. Just maybe a couple times a month, if
23 that.

24 Q. Do you recall a time period when you
25 all dealt with or were involved with Kenco?

1 A. Probably right in the thick of things,
2 like 2002 to 2004.

3 Q. Do you recall dealing with Kenco in
4 2005/2006?

5 A. I wasn't completely handling it then,
6 and I think there were -- if there were
7 pickups there, I don't recollect.

8 Q. Was Amy primarily handling it then?

9 A. I honestly don't know how much we were
10 dealing with Kenco at that point in time.

11 Q. Okay. Did you personally ever talk
12 with anyone with Kenco?

13 A. Sure, if they called with, again, the
14 pickup number, the material, the pounds, I
15 would be notified via a telephone call.

16 Q. Would they ever issue you paperwork
17 directly from Kenco?

18 A. We would chase down the packing lists.

19 Q. Ms. Norris, I want to show you what's
20 previously been marked as Exhibit 5, and also
21 Exhibit 6. These were marked yesterday with
22 Mr. Hamilton.

23 MR. LEE: I've got clean copies,
24 Winston. Do you want another copy?

25 MR. BRIGGS: That's all right. I

1 positive. But she might not be in -- I know
2 that she was either transferred to another
3 department or, I don't even know, she might
4 have even left the company.

5 Q. Turning to Exhibit 6, and Exhibit 6
6 I'll represent is a compilation of documents
7 that we obtained from Fiber Resources' files
8 this past Friday. And when we spoke earlier,
9 a few minutes ago, we were talking about FRI's
10 practice of keeping all the documentation
11 related to a particular shipment together,
12 particular invoice together. Is Exhibit 6
13 exemplary of that type of practice, if you
14 thumb through the document?

15 A. (Witness reviews document). Yes,
16 it's -- yes, I would say so.

17 Q. Sort of thumbing through the front of
18 it from front to back quickly, I noticed the
19 cover page refers to bill payment
20 confirmation, is that correct?

21 A. Yes.

22 Q. And if you were handling the books at
23 the time, you would have been the person
24 processing these invoices and ensuring the
25 payments were made?

Page 41

1 A. This was Patrice Dent's, but yes.

2 Q. But during the time period you were
3 responsible, you would be doing the same?

4 A. If I were handling the books.

5 Q. Now, the second page, turning back, is
6 an invoice for one of the shipments
7 referenced, is that correct?

8 A. Yes.

9 Q. Now, looking at the third, fourth and
10 fifth pages, do these appear to be what we
11 described earlier as a packing list?

12 A. Correct.

13 Q. With the fourth and fifth pages
14 listing the pallets?

15 A. Pallet numbers, yes.

16 Q. Now, the sixth page would be a bill of
17 lading?

18 A. Yes.

19 Q. With the seventh page being, again,
20 another fax cover page from Kenco?

21 A. Right.

22 Q. So would it appear that then from
23 Kenco they would have faxed over this packing
24 list that precedes the cover sheet that we
25 just were talking about?

1 A. Yes.

2 Q. Here, the fax cover sheet refers to
3 Vanessa Sammons as the export clerk for Kenco.
4 Did you ever speak to or deal directly with
5 Ms. Sammons?

6 A. I might have spoken with her, I don't
7 recollect.

8 Q. Now, I understand, of course, these
9 are various different documents related to a
10 different time in the process for a particular
11 shipment, but is it your understanding that
12 all of these documents had come in to Fiber
13 Resources during the regular course of its
14 business?

15 A. I don't know what your question is.

16 Q. Okay. I know all the documents that
17 are compiled as Exhibit 6, it's a compilation
18 of different documents; is that fair?

19 A. Yes.

20 Q. And they were aggregated into one file
21 by Fiber Resources at some point in the filing
22 process, is that correct?

23 A. When we made out a payment, it looks
24 like we paid four invoices.

25 Q. And all of the documents that are

1 compiled as part of this exhibit would have
2 come in at some point during Fiber Resources'
3 regular course of business?

4 A. By come in, I don't know what you
5 mean. Come in to --

6 Q. Well, they would have been --

7 A. Come in to the warehouse, come in to
8 the computer system.

9 Q. They would have been delivered to
10 Fiber Resources at some point either by fax or
11 by mail?

12 A. Oh, the paperwork, yes, right.

13 Q. Correct. That's what I'm referring
14 to, the paperwork would come in to Fiber
15 Resources.

16 A. Okay. I didn't know if you meant the
17 material.

18 Q. No, I understand. Thank you for
19 clarifying. No, I don't mean the material --

20 A. Yes, the paperwork would come in, yes.

21 Q. Because the physical document itself
22 is a compilation of various paperwork.

23 A. Correct.

24 Q. And the paperwork would have been
25 generated at various different times in the

1 process.

2 A. Right.

3 Q. But all of it would have been compiled
4 together as it had to come in through Fiber
5 Resources' regular course of business?

6 A. Right.

7 Q. Actually, turning back to Exhibit 6,
8 if you could.

9 A. Uh-huh.

10 Q. I don't know the page number, to be
11 honest, but it's going to be, if you find the
12 Kenco fax cover sheet and it's about three
13 pages back, appears to be a series of e-mails
14 where you are either the recipient or copied
15 on -- actually, it's the third page behind the
16 Kenco cover sheet. So it's like the seventh
17 page in. The page I'm referring to appears to
18 be a few different e-mails in the February
19 2006 timeframe. Do you see that?

20 A. Yes.

21 Q. -- between, at the bottom, between a
22 Memo Rivera to a Tina Ingle, copied to you, a
23 then from the top from a Guillermo Rivera to
24 you; do you see that?

25 A. Yes.

1 back --

2 A. Yes.

3 Q. -- there's what's looks like a form,
4 it says standard conditions of sale, do you
5 see that?

6 A. Yes.

7 Q. Do you ever recall discussing any of
8 these conditions of sale with anybody at
9 Invista?

10 A. No.

11 Q. Now, this document follows the second
12 page, which appears to be -- the standard
13 conditions of sale follow what appears to be
14 the second page, which is labeled invoice; do
15 you see that?

16 A. Yes.

17 Q. Do you know if this document, if the
18 invoice would have come in in effect two-sided
19 with the invoice numbers on the front page and
20 the conditions of sale on the back?

21 A. I believe this would have been an
22 invoice and this would have been the back side
23 (indicating).

24 Q. So since it was an invoice, it would
25 have been the regular practice for that to be

1 received by mail?

2 A. Right.

3 Q. Do you ever recall invoices being
4 received by fax?

5 A. I'm sure we've had faxed invoices.

6 Q. Do you recall if you got faxed
7 invoices more than mailed invoices or
8 vice-versa?

9 A. Typically, probably more mail.

10 Q. Do you ever recall getting invoices
11 sent by e-mail, by PDF?

12 A. Not to my knowledge.

13 Q. I understand that at some point either
14 DuPont early on or Invista implemented an SAP
15 system for its billing and ordering system, is
16 that correct?

17 A. Yes.

18 Q. As part of an SAP system, do you ever
19 recall getting automatically e-mailed
20 documentation from Invista?

21 A. I automatically didn't get e-mailed a
22 lot. As I said, I had to chase down
23 paperwork. It was a ceaseless persistence.

24 Q. Okay. Looking I guess at the third
25 page for these standard conditions of sale

1 document again, have you seen this before?

2 A. Again, I know that's on the back side
3 of an invoice. I'm sure I've laid eyes on it
4 before. I don't know that I've read it.

5 Q. Did you have any reason to make use of
6 it as part of your dealings with Invista or
7 DuPont?

8 A. No.

9 Q. To your recollection, whenever FRI
10 received a mailed invoice, were those sort of
11 standard language terms and conditions on the
12 back?

13 A. When -- I'm sorry?

14 Q. FRI received an invoice in the mail,
15 to your recollection --

16 A. From Invista?

17 Q. From Invista, yes. To your
18 recollection, do you recall seeing those
19 standard terms and conditions on the back?

20 A. I'm sure that they were standard on
21 the back of the invoice, yes.

22 Q. Do you ever recall when you would get
23 faxed invoices, whether you would see --
24 since, of course, the document comes through
25 fax one-sided as opposed to two-sided, would

EXHIBIT C

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November 21, 2007

Via Facsimile and U.S. Mail

Thomas C. Marconi
Losco & Marconi, P.A.
1813 N. Franklin Street
P.O. Box 1677
Wilmington, Delaware 19899

Re: *INVISTA v. Fiber Resources*

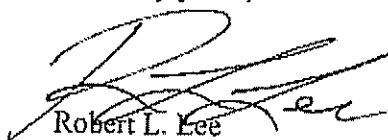
Dear Tom:

We still have not yet received Fiber Resources' Initial Disclosures in this case. At your request, we previously extended the deadline for those disclosures until October 19, 2007. They are now two months overdue. I have previously contacted you to inquire as to the status of your client's production of its Initial Disclosures, but did not receive a response.

We will be required to move the Court to compel your client's production of its Initial Disclosures if we do not receive them by Wednesday, November 28, 2007.

Please do not hesitate to contact me with any questions.

Sincerely yours,



Robert L. Lee

RLL:rll

cc: Jeff Moyer
Kelly Farnan

LEGAL02/30611196v1

EXHIBIT D

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KELLY E. FARNAN

DIRECT DIAL NUMBER

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FARNAN@RLF.COM

January 16, 2008

VIA HAND DELIVERY and E-MAIL

David L. Finger, Esquire
Finger & Slanina, LLC
One Commerce Center
1201 Orange Street, Suite 725
Wilmington, DE 19801-1155

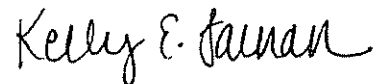
**Re: INVISTA S.a.r.l. and INVISTA (Canada) Company v. Fiber
Resources International, Inc., D.Del., C.A. No. 07-119-GMS**

Dear David:

We have not yet received Fiber Resources' responses to INVISTA's First Set of Interrogatories and Requests for Production. While Fiber Resources responses were due on January 3, 2008, we previously agreed to an extension until January 8, 2008 to respond to this outstanding discovery. If we do not receive responses by noon this Friday, January 18, we will call the Court and request a discovery dispute teleconference pursuant to the Court's discovery dispute resolution procedures.

If you have any questions concerning the foregoing, please do not hesitate to contact me.

Very truly yours,



Kelly E. Farnan

KEF/th

cc: Robert L. Lee, Esq. (via e-mail)

EXHIBIT E

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

3 - - -

4 INVISTA S.a.r.l. and INVISTA : Civil Action
5 (Canada) Company, :
6 Plaintiffs, :
7 v. :
8 FIBER RESOURCES INTERNATIONAL, :
9 INC., :
10 Defendant. : No. 07-119 (GMS)

11 - - -

12 Wilmington, Delaware
13 Friday, September 28, 2007
14 9:30 a.m.
15 Telephone Conference

16 - - -

17 BEFORE: HONORABLE GREGORY M. SLEET, Chief Judge

18 APPEARANCES:

19 JEFFREY L. MOYER, ESQ.
20 Richards, Layton & Finger

21 Counsel for Plaintiffs

22 THOMAS C. MARCONI, ESQ.
23 Losco & Marconi, P.A.

24 Counsel for Defendant
25

1 THE COURT: Good morning. Who is on the line
2 for the plaintiff?

3 MR. MOYER: Your Honor, Jeff Moyer, Richards
4 Layton & Finger, on behalf of the plaintiffs.

5 THE COURT: For Fiber Resources?

6 MR. MARCONI: Thomas Marconi of Losco & Marconi
7 for the defendant.

8 THE COURT: All right. Good morning.

9 A couple of things before we get into the
10 schedule.

11 Are we to anticipate the filing of motions in
12 this case from Fiber regarding jurisdiction and possibly
13 seeking a transfer of this matter?

14 MR. MARCONI: We are, Your Honor, yes.

15 THE COURT: Give me some sense of the
16 jurisdictional challenge and its basis.

17 MR. MARCONI: The only basis, as far as I
18 understand, that there is jurisdiction here is -- I mean,
19 there is diversity someplace, perhaps there is diversity
20 someplace. There would be diversity in this district.
21 There is enough at stake and the citizenship satisfies it.
22 The only real basis for jurisdiction, I think, is a
23 contractual one.

24 The plaintiff, I think, contends that we agreed
25 to jurisdiction and venue in Delaware by virtue of language

1 that we -- I think they were called order confirmation
2 forms. But the defendants are telling me that those order
3 confirmation forms were never sent to them with the orders,
4 the orders came in through faxes, and that those forms were,
5 I think, snap-out carbon forms that had writing on the back,
6 and that most of the time the orders were placed and filled
7 orally, and they never received any of those confirmations.

8 THE COURT: Sounds like a bar exam question. Go
9 ahead.

10 MR. MARCONI: So we don't think we are bound by
11 the contractual jurisdiction and venue argument, if you
12 will.

13 THE COURT: Let's just talk about in personam
14 jurisdiction for a moment. Leave venue aside for a moment.
15 Let me hear from plaintiff on this.

16 MR. MOYER: Your Honor, we do have agreements
17 that are part of our order confirmation and our invoices for
18 each of the shipments at issue. And each one has a
19 crystal-clear forum selection, exclusive forum selection
20 clause for the Courts of the State of Delaware, or if
21 jurisdiction is proper the Federal Court in the State of
22 Delaware.

23 We believe that each one of these forms was sent
24 along with each one of the order confirmations and that it's
25 a binding contract between the parties, and we had no choice

1 but to file suit in this jurisdiction, and that the
2 defendant, the language is the defendant unconditionally and
3 irrevocably consented to the personal jurisdiction of the
4 Courts in the State of Delaware, including the Federal
5 Court.

6 THE COURT: During your meet-and-confer,
7 counsel, did you have a chance to discuss this?

8 MR. MOYER: The jurisdictional issue?

9 THE COURT: Yes.

10 MR. MOYER: Your Honor, I actually have not
11 discussed the jurisdictional issue with Mr. Marconi.

12 MR. MARCONI: Again, Your Honor, I would be
13 pleased to transfer the case down to the Northern District
14 of Georgia.

15 THE COURT: Again, that is not what I want to
16 talk about right now. Transfer is a different issue. This
17 is the forum -- if we were just looking at Jumara factors --
18 that the plaintiff has selected.

19 So that selection, that choice, is going to be
20 given paramount consideration, apart from the assertion by
21 plaintiff as to the binding nature of the Court's
22 jurisdiction here, that is, the binding nature of the
23 contractual language.

24 MR. MARCONI: The commercial issue aside, Your
25 Honor, as we say in the report, there is just no contact

1 with the State of Delaware at all.

2 THE COURT: Well, that may be. But if you have
3 contracted, if your client has contracted with the plaintiff
4 and in that contract agreed to jurisdiction here, what would
5 be the basis to contest that, that the Court has
6 jurisdiction?

7 MR. MARCONI: Well, there would be less of a
8 basis for sure. But, I mean, as I say, that is going to
9 have to be an issue that the Court is going to have to
10 decide. We will do some discovery on it.

11 THE COURT: That is fine. You can do discovery
12 on it. Whether the Court has to decide it or not is why I
13 am taking the time to discuss this with you. In the
14 interests of judicial economy and saving this Court's
15 resources, it is incumbent upon counsel to have at least
16 some preliminary discussion to determine whether there is a
17 colorable basis for filing the motion challenging the
18 jurisdiction. If there is not, I am going to take a very
19 dim view of that kind of filing.

20 I hope I am making myself clear.

21 MR. MARCONI: You are, Your Honor.

22 THE COURT: I expect there to be a conversation
23 and exchange of views and authorities on this subject before
24 any paper is filed on that.

25 I think once that is decided, then, depending

1 upon how it goes, it may take care of the transfer, any
2 notions of filing a transfer motion as well. But I am going
3 to direct counsel to explore this in further discussions,
4 okay?

5 MR. MARCONI: Yes, Your Honor.

6 THE COURT: I am going to pretty much adopt the
7 schedule, moving on to that, that you have jointly proposed.
8 I am assuming this is a joint proposal. Is that correct?

9 MR. MOYER: No, Your Honor. That is the
10 plaintiffs' proposal. Mr. Marconi did not join in that
11 proposal, but we wanted to have a schedule before the Court.

12 MR. MARCONI: Your Honor, the only reason I
13 didn't at the time was that Fiber Resources is, for lack of
14 a better term, somewhat of a one-man show in terms of
15 authority. And the person was in China, and I could not get
16 to him. The only reason I didn't consent to it is because I
17 couldn't run it by the client.

18 But it's fine.

19 THE COURT: Okay. Let me go to the back end.
20 In terms of the type of trial, both parties are desirous of
21 a Bench trial in this case?

22 MR. MOYER: Your Honor, in our contract, both
23 parties agree to waive a jury trial.

24 THE COURT: What's Fiber Resources position on
25 that?

1 MR. MARCONI: That is fine, Your Honor. I don't
2 think it is a jury trial kind of thing.

3 THE COURT: All right. Then let's just on the
4 record go through the dates that are proposed for
5 accomplishing things, by, I will now say the parties.

6 So all discovery, as I understand it in
7 Paragraph 3 in the proposed scheduling order, including
8 merits and expert discovery, is proposed to be completed on
9 or before the -- that is initiated in time to be completed
10 on or before the 18th day of January of 2008. Is that
11 correct?

12 MR. MOYER: That was the plaintiffs' proposal,
13 Your Honor.

14 MR. MARCONI: I don't think there is going to be
15 a lot of discovery, frankly.

16 THE COURT: I wouldn't imagine there would be.

17 There is some mention in this paragraph of
18 expert reports. What kind of experts do the parties
19 anticipate needing in this kind of case?

20 MR. MOYER: Your Honor, for the plaintiffs I am
21 not sure we will need any expert.

22 THE COURT: From Fiber Resources' point of view?

23 MR. MARCONI: I can't think of any now, Your
24 Honor.

25 THE COURT: Then we will leave it at that. All

1 discovery will be completed by January 18th. You can
2 eliminate, then, the provision in the second sentence of
3 that paragraph for opening expert reports. If you are not
4 going to need them, there doesn't need to be any language in
5 the scheduling order that's going to confuse the issue.

6 The laboring oar for preparing this scheduling
7 order will remain with the plaintiff. Okay, counsel?

8 MR. MOYER: Yes, Your Honor.

9 THE COURT: I would like you to circulate it to
10 Fiber and get it filed by next Friday, October 5.

11 The schedule, the proposed scheduling order
12 contains current language as to the Court's discovery
13 dispute resolution process and other items. So I am not
14 going to go through that again. Both of you know how to
15 read.

16 Case-dispositive motions, the cutoff for filing
17 those, case- or issue-dispositive motions, will be February
18 8th, 2008, as proposed.

19 We are going to convene a pretrial conference
20 here in chambers, I have time that we can do this in June.
21 We can do the trial, actually, in July. So I am going to
22 adopt the June submission date, June, close of business --
23 let me back up for a second.

24 I am not exactly going to adopt the language of
25 Paragraph 9. Here is what you are going to do. You are

1 going to submit the proposed pretrial order by the close of
2 business on June 2. You can reconfigure this language to
3 reflect that. June 30, 10:00 o'clock, will be the pretrial
4 conference. We will set this matter down for trial
5 beginning July the 21st.

6 Do both parties believe that we are going to
7 need four days to try this case, as proposed?

8 MR. MOYER: Your Honor, I am not entirely sure
9 what the defendant has in mind for their counterclaim. But
10 I think we can get our case on and off in two days. I don't
11 know how much time they would need.

12 THE COURT: How about that?

13 MR. MARCONI: Your Honor, I think four days is
14 probably safe.

15 THE COURT: All right. We will leave it at
16 four. And both parties want this matter referred to one of
17 our Magistrate Judges. Is that correct?

18 MR. MOYER: For the plaintiff, yes, Your Honor.

19 MR. MARCONI: Yes, Your Honor, for the
20 defendant.

21 THE COURT: I think that that will be of
22 potentially great use and assistance to you.

23 You can keep that paragraph in there.

24 I think we have covered all of the relevant
25 dates, the significant dates. Have you done initial

1 disclosures?

2 MR. MOYER: No, Your Honor. We had them set for
3 October 5th.

4 THE COURT: That is fine. Is that agreed to by
5 Fiber, agreeable to Fiber?

6 MR. MARCONI: Yes, Your Honor.

7 THE COURT: Counsel, anything else that we need
8 to talk about today?

9 MR. MOYER: Not from the plaintiffs'
10 perspective, Your Honor.

11 MR. MARCONI: Not the defendant's, Your Honor.

12 THE COURT: Good luck. And we will see you
13 along the way.

14 (Conference concluded at 9:45 a.m.)

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16 Reporter: Kevin Maurer

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